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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 439

JOHN DOOLIN, d/b/a National Novelty Company, et al.,
Plaintiffs-Appellants,

vs.

MARSHALL KORSHAK, Director of Revenue, et al.,
Defendants-Appellees.

Appeal from the Supreme Court of the State of Illinois

MOTION TO DISMISS

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Opinion Below

The opinion of the Supreme Court of the State of Illinois is reported at 39 Ill. 2d 521.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Jurisdictional Statement.

Question Presented

Whether a substantial federal question has been established by the plaintiffs?

Statutes and Ordinances Involved

The Leasing Occupation Tax Act and the Leasing Use Tax Act and related ordinances are set forth in the Appellants' Jurisdictional Statement (J. S. App. 19-57).

Statement of the Case

The opinion of the Supreme Court of the State of Illinois correctly sets forth the Statement of the Case (J. S. App. 10-18).

ARGUMENT

The Appeal Should Be Dismissed For The Plaintiffs Have Failed To Present A Substantial Federal Question.

Section 1 of Article IX of the Constitution of the State of Illinois provides in part:

> "* * * The general assembly shall have power to tax * * * persons or corporations owning or using franchises and privileges, in such manner as it shall from time to time direct by general law, uniform as to the class upon which it operates."

In relation to the foregoing, the Courts have consistently recognized that the State of Illinois possesses the sovereign power to tax any occupation for the purpose of raising revenue. *Department of Finance* v. *Gandolfi,* 375 Ill. 237; *Price* v. *People,* 193 Ill. 114.

Pursuant to the aforementioned legislative grant and the construction thereof by the Courts, the General Assembly enacted the Leasing Occupation Tax Act (Ill. Rev. Stats. 1965, Ch. 120, Pars. 453.101 *et seq.*) (J. S. App. 19) (hereinafter referred to as L.O.T.) and the Leasing Use Tax Act (Ill. Rev. Stats. 1965, Ch. 120, Pars. 453.121 *et seq.*) (J. S. App. 30), (hereinafter referred to as L.U.T.), which are the subject matter of the case at bar.

The imposition of a tax upon the occupation of leasing and the use thereof is relatively new, but such transactions have been held subject to taxation in many jurisdictions. *Union Oil Co.* v. *State Bd. of Equalization,* 386 P. 2d 496 (S. C. Calif., 1963); *Central Trans. Co.* v. *Atkins,* 305 S. W. 2d 940 (S. C., Tenn. 1958); *Peterson* v. *Oklahoma Tax Com.,* 395 P. 2d 388 (S. C. Okla., 1964); *Besser Co.* v. *Bu-*

reau of Revenue, 394 P. 2d 141 (S. C. N. Mex., 1964); *Recording Devices, Inc.* v. *Bowers,* 190 N. E. 2d 258 (S. C. Ohio, 1963); *Lakewood Lanes, Inc.* v. *State,* 380 P. 2d 466, (S. C. Wash. 1963); *State* v. *Kershaw Mfg. Co.,* 137 So. 2d 740 (S. C. Ala. 1962); *Piedmont Canteen Service* v. *Johnson,* 123 S. E. 2d 582 (S. C. No. Car., 1962)); *Young Electrical Sign Co.* v. *Utah State Tax Com.,* 291 P. 2d 900 (S. C. Utah, 1955).

On August 2, 1966, the plaintiffs, who are various lessors and lessees in Illinois of tangible personal property, filed a complaint for injunction and other relief seeking to restrain the collection of the L.O.T. and the L.U.T.

On February 6, 1967, the Circuit Court of Cook County dismissed the cause and this decree was affirmed by the Supreme Court of Illinois in accord with the aforementioned constitutional, statutory and judicial authorities (J. S. App. 1-18).

Examination of the decision of the Supreme Court of Illinois reveals that the plaintiffs raised several state procedural, state constitutional and Federal constitutional issues which were fully considered and ruled upon by that court (J. S. App. 1-18).

The plaintiffs in their Jurisdictional Statement have attempted to predicate jurisdiction upon (1) The Commerce Clause of the United States Constitution; (2) abstract constitutional questions; and, (3) the violation of equal protection clause through the imposition of a different base on the L.O.T. and the L.U.T. (J. S. 5-12).

The defendants submit that none of the foregoing are predicated upon a substantial federal question upon which jurisdiction may be based.

Commerce Clause

The plaintiffs have attempted to create a substantial federal question by suggesting that the "Commerce Clause of the United States" has been misinterpreted by the Supreme Court of the State of Illinois (J. S. 5-10).

The "Commerce Clause" *per se* was not an issue in the state courts, but rather only in relation to the question of uniformity of classification.

After imposing a tax upon all lessors and lessees of tangible personal property in the State of Illinois, the General Assembly exempted from the impact of the Acts, "renting or leasing in this State of tangible personal property to a lessee where such property is moving by an interstate carrier for him as rolling stock moving in interstate commerce." (Ill. Rev. Stat. 1965, ch. 120, pars. 453.103 and 453.123) (J. S. App. 23, 34).

The Illinois Supreme Court in *People ex rel. Holland Coal Co.* v. *Isaacs,* 22 Ill. 2d 477, succintly set forth the *criteria* upon which the Legislature may constitutionaly differentiate between heterogenous classes.

> "The legislature in levying an occupation tax has great latitude in establishing the class to which the tax shall apply. *Reif* v. *Barrett,* 355 Ill. 104, 188 N.E. 889; *Ohio Oil Co.* v. *Wright,* 386 Ill. 206, 53 N.E. 2d 966; *McGrath* v. *City of Chicago,* 309 Ill. 515, 141 N.E. 299. The classifications in tax statutes must be based upon real and substantial differences between persons taxed and those not taxed, (*Ohio Oil Co.* v. *Wright,* 386 Ill. 206, 53 N.E. 2d 966; *City of Chicago* v. *Ames,* 365 Ill. 529, 7 N.E. 2d 294, 109 A.L.R. 1509), and they must bear some reasonable relationship to the object of the legislation, (*Modern Dairy Co.* v. *Department of Revenue,* 413 Ill. 55, 109 N.E. 2d 8,) or to public policy. *Reif* v. *Barrett,* 355 Ill. 104, 188 N.E. 889."

The question therefore is not whether in fact the General Assembly was required to exempt "rolling stock" but rather if a real and substantial difference did exist between intra and inter state commerce.

Basically, the plaintiffs' contention of invalidity, ignores the fact that an exemption is valid if it is based on some reasonable difference in the situation of the parties and need not be based solely upon the federal requirements of the Commerce Clause of the Constitution of the United States. There is a significant difference between interstate and intrastate commerce which alone would justify the exemption.

Furthermore, there is a real possibility that absent the exemption there would in fact be a violation of federal law. In *Helson* v. *Kentucky,* 279 U.S. 245, it was held that a Kentucky use tax on an interstate carrier for its use in Kentucky or on fuel purchased outside the state and used by the carrier in the stream of interstate commerce was a violation of the Commerce Clause. See also *American Oil Co.* v. *Neil,* 380 U.S. 451.

The exemption of rolling stock in interstate commerce was based upon a reasonable difference in classification and is therefore constitutional.

It is apparent that the plaintiffs have failed to establish the existence of a substantial federal question. The "Commerce Clause" is not directly involved but rather only as a basis for a differentiation in classification.

In addition, under Illinois procedure law, the Acts would not become invalid if this specific exemption were unconstitutional, but merely the exemption would fall (*Holland Coal Co.* v. *Issacs,* 22 Ill. 2d 477, 484). The tax would therefore fall upon the lessors and lessees without a class

diminution, and the intrastate carriers would still be subject to taxation.

Tax Base

The plaintiffs suggest generally that the Acts are unconstitutional because the L.O.T. is based on retail value while no limitation is based upon the L.U.T. (J. S. 11)*

In *Turner* v. *Wright,* 11 Ill. 2d 161, the plaintiff attacked the validity of the Use Tax Act because it imposed, by definition, a greater burden on the purchaser than upon the retailer. This Court, in holding said provisions constitutionally permissible, said (p. 168-169):

> "There is, however, one respect in which the use tax does not precisely complement the retailers' occupation tax. The former tax is based upon 'selling price,' the latter of 'gross receipts' from sales. 'Selling price' is defined in both statutes to mean the consideration for a sale value in money whether received or paid in money or otherwise, 'including cash, credits, service and property of every kind or nature * * *' (Ill. Rev. Stat. 1955, chap. 120, pars. 439.2, 440.) By an amendment in 1955, however, the definition of 'gross receipts' in the Retailers' Occupation Tax Act was amended so that it 'means the total selling price * * *, excluding therefrom any amount allowed as credit for tangible personal property taken in trade.' (Ill. Rev. Stat. 1955, chap. 120, par. 440.) The result of this discrepancy in definitions is that in cases in which property is received in trade as a part of the purchase price, the tax due may not be the same under the two statutes. For example, if a new car is purchased for $3,000 and the buyer's old one is received in trade at $1,000, the use tax will be $75. Under the Retailers' Occupation Tax Act, however, the value of

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* Incorporated by Reference—Appellants' Brief Point VII—Illinois Supreme Court.

> the old car would not be included in the 'gross receipts' on which the tax is computed, so that the tax would be $50. The retailer, however, is required to remit to the Department the full $75, because he is excused from remitting the use tax that he collects only to the extent that he remits the retailer's tax with respect to the same transaction. *No discrimination between purchasers is involved in this situation, because each purchaser is required to pay the same amount as every other purchaser. And there is no unjust enrichment of the retailer, for he is required to remit to the Department the full amount that he has collected. That the two are not precisely identical therefore deprives no one of any constitutional rights.* (Emphasis added.)

In the *Turner* case the Court thus held that there was a significant and cognizable difference between a retailer and a purchaser and that because there was no discrimination between the *purchasers,* nor unjust enrichment of the retailer, that no one was deprived of any constitutional rights.

As the Court so found the difference between retailers and purchasers, there is an equal or more significant differentiation between lessors and lessees; a difference which fully justifies the classifications.

In the first instance, the lessor retains all incidents of ownership which carry with it the burden of the possibility of obsolescence, destruction or cancellation of the lease. Conversely, the lessee assumes only the burden to pay rent for the duration of the lease.

As to the lessees as a class, if the tax were to be based on the "fair market value", there is a possibility of an unconstitutional discrimination among the class of lessees. If a lessor were to purchase or manufacture an item with the value of $2,000 and lease it to lessee A for one year

at a rental of $100 per month, lessee A would then incur a tax based on $1,200. If then the lessor entered into a subsequent one year lease for $100 per month to lessee B, lessee B would be only taxed upon the remaining untaxed value: $800. Such an exemption measured by "fair market value" would create a discrepancy within a class.

There are also practical considerations which demand the imposition of a tax on the entire rental proceeds for otherwise it would be of an advantage to the lessee to retain and use obsolete goods which had surpassed their "fair market value". In addition evaluation could be a problem for the "fair market value", not being subject to a sale at retail, could be set an an arbitrary and inequitable amount. Of equal importance is the fact that improvements to the tangible personal property after the date of the lease would escape taxation for the "fair market value" is measured upon the value at the date of the lease.

General Constitutional Allegations

The plaintiffs have attempted to raise additional constitutional questions by stating "The totality and cumulative effect of the Federal and State constitutional objections to which the statutes assailed are amenable, * * *" (J. S. 10-11).

Having this general catch all with which to contend, the defendants refer this Honorable Court to the decision of the Illinois Supreme Court to establish that all constitutional issues raised and ruled upon were so done in full accord with the requirement of the Constitution of the United States.

CONCLUSION

The plaintiffs have failed to establish the existence of a substantial federal question and therefore this appeal should be dismissed.

Respectfully submitted,

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